

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ELEANOR J. CROUCH,)	CASE NO. C05-1598-RSL
)	
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION
)	RE: SOCIAL SECURITY
JO ANNE B. BARNHART, Commissioner)	DISABILITY APPEAL
of Social Security)	
)	
Defendant.)	
)	

Plaintiff Eleanor J. Crouch proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Disability Insurance (DI) benefits after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, it is recommended that this matter be AFFIRMED.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1941.¹ She has an 11th grade education. Plaintiff previously

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 worked as a forklift driver. She alleges that she became disabled on December 31, 1991 due to
02 a back injury and muscle spasms. Her date last insured is December 31, 1996, so she must
03 establish entitlement to DI benefits on or prior to this date. Her application was denied initially
04 and on reconsideration, and she timely requested a hearing.

05 An ALJ held a hearing on September 9, 2004, taking testimony from plaintiff and a
06 vocational expert. (AR 206-29.) On October 1, 2004, the ALJ issued a decision finding plaintiff
07 not disabled. (AR 16-19.)

08 Plaintiff timely appealed. On August 1, 2005, the Appeals Council denied her request for
09 review after considering additional evidence. (AR 5-9.) Plaintiff appealed this final decision of
10 the Commissioner to this Court.

11 **JURISDICTION**

12 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

13 **DISCUSSION**

14 The Commissioner follows a five-step sequential evaluation process for determining
15 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
16 be determined whether the claimant is gainfully employed. At step two, it must be determined
17 whether a claimant suffers from a severe impairment that has lasted or is expected to last for
18 twelve continuous months. Step three asks whether a claimant's impairments meet or equal a
19 listed impairment. If a claimant's impairments do not meet or equal a listing, the Commissioner
20 must assess RFC and determine at step four whether the claimant has demonstrated an inability
21 to perform past relevant work. If a claimant demonstrates an inability to perform past relevant
22 work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains

01 the capacity to make an adjustment to work that exists in significant levels in the national
02 economy. In this case, the ALJ did not make specific step one, three, four or five findings, having
03 found that plaintiff did not have any medically determinable impairments that lasted at least 12
04 continuous months prior to her date last insured.

05 This Court's review of the ALJ's decision is limited to whether the decision is in
06 accordance with the law and the findings supported by substantial evidence in the record as a
07 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
08 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
09 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
10 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
11 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
12 2002).

13 Plaintiff argues that the ALJ erred in not accepting her testimony that her pain limits her
14 physical ability to do basic work activities. Plaintiff suggests this amounted to an adverse
15 credibility finding without making specific findings. Plaintiff further argues that substantial
16 evidence does not support the ALJ's determination that she did not have any severe impairments.
17 She asks that the Court remand this matter for further administrative proceedings. The
18 Commissioner argues that the ALJ's finding that plaintiff did not meet the threshold requirement
19 of severity was supported by substantial evidence and should be affirmed. For the reasons
20 described below, the undersigned recommends that the decision be affirmed.

21 Step Two

22 A social security claimant bears the burden of proving she is disabled. *Edlund v.*

01 *Massanari*, 253 F.3d 1152, 1157 (9th Cir. 2001). At step two, she must make a threshold
02 showing that her medically determinable impairments significantly limit her ability to perform basic
03 work activities. See *Bowen v. Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. § 416.920(c).
04 “Basic work activities” refers to “the abilities and aptitudes necessary to do most jobs.” 20 C.F.R.
05 § 416.921(b). An impairment must result from “anatomical, physiological, or psychological
06 abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic
07 techniques” and must be expected to last for a continuous period of not less than 12 months. 42
08 U.S.C. §§ 423(d)(1)(A), (d)(3). “An impairment or combination of impairments can be found ‘not
09 severe’ only if the evidence establishes a slight abnormality that has ‘no more than a minimal effect
10 on an individual’s ability to work.’” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996)
11 (quoting Social Security Ruling (SSR) 85-28). “[T]he step two inquiry is a de minimis screening
12 device to dispose of groundless claims.” *Id.* (citing *Bowen*, 482 U.S. at 153-54). An ALJ is also
13 required to consider the “combined effect” of an individual’s impairments in considering severity.
14 *Id.*

15 In this case, the ALJ found that, as of plaintiff’s date last insured (December 31, 1996),
16 she “did not have any medically determinable impairment that lasted at least 12 continuous
17 months.” (AR 18.) In reaching this conclusion, the ALJ discussed the medical evidence:

18 On September 23, 1992 the claimant complained of “knee cracking”. X-rays of the
19 claimant’s knees were normal. The claimant also complained of epigastric distress.
An ultrasound of the claimant’s abdomen was normal.

20 On December 2, 1996 the claimant presented to a hospital emergency room,
21 complaining of mid and low back pain for the last five years. There was no trauma
22 associated with the onset of the pain. She did not remember doing anything unusual
or doing any heavy lifting. The claimant complained of severe painful back spasms
that day. There was no pain radiation and no bowel or bladder dysfunction.

01 Thoracolumbar spinal x-rays were normal. There was perhaps minor diffuse
02 osteopenia but otherwise there was a satisfactory appearance to the structure of the
03 vertebral bodies. There was a minor degree of degenerative disc change and facet
04 degenerative joint disease mainly in lower two disc levels. There was some slight
aortic calcification noted on the lateral. The emergency room physician stated that
these x-rays showed no acute abnormalities. The claimant was diagnosed with spinal
sprain with acute muscular spasm.

05 On December 5, 1996 the claimant's treating physician noted that the claimant
06 returned to see him for the first time in nearly two years. The doctor noted that the
07 claimant had been seen in an emergency room three days before for a pulled right
flank muscle and x-rays were negative. The claimant reported that she had been
taking ibuprofen, methocarbamol and hydrocodone with moderate pain relief.

08 (AR 17 (citations to record omitted.))

09 In challenging the ALJ's finding that she did not meet the threshold level of severity,
10 plaintiff raises several arguments. First, plaintiff argues that the decision does not set forth legally
11 sufficient reasons for rejecting her testimony. This argument is not well taken. In finding that
12 plaintiff failed to establish a medically determinable impairment that lasted at least 12 continuous
13 months, the ALJ did not need to reach the issue of the credibility of plaintiff's testimony about her
14 limitations. "No symptom or combination of symptoms can be the basis for a finding of disability,
15 no matter how genuine the individual's complaints may appear to be, unless there are medical
16 signs and laboratory findings demonstrating the existence of a medically determinable physical or
17 mental impairment(s) that could reasonably be expected to produce the symptoms." SSR 96-7p;
18 *accord Smolen*, 80 F.3d 1273. The credibility of the individual's testimony about symptoms is
19 considered only when the existence of such an impairment has been established. In other words,
20 "medical conditions alone may justify a finding that the individual is not under a disability."
21 *Bowen*, 482 U.S. at 148.

22 Plaintiff correctly asserts that an ALJ should consider the "combined effects" of an

01 individual's impairments when assessing severity. However, this principle does not inure to her
02 benefit without a showing that such medically determinable impairments actually exist. Here, the
03 only evidence of an impairing condition offered by plaintiff is mere conjecture. In her brief,
04 plaintiff argues that her pain complaints "could have been the result of her obesity, osteopenia,
05 degenerative disc change and degenerative joint disease," and that the T6 compression fracture
06 and osteoporosis "could have existed in 1996 and . . . could have been the primary cause" of her
07 pain. (Dkt. 12 at 10 (emphasis added.)) It is plaintiff's burden to establish the existence of an
08 impairment. "It is not unreasonable to require the claimant, who is in a better position to provide
09 information about his own medical condition, to do so." *Bowen*, 482 U.S. at 146. Therefore,
10 plaintiff's contention that the ALJ failed to consider the combined effects of her obesity and back
11 impairments, when the record contains no evidence that such medically determinable impairments
12 (as opposed to a mere "diagnosis") exist, is unavailing.

13 Plaintiff additionally cites SSR 83-20 and *Armstrong v. Commissioner*, 160 F.3d 587 (9th
14 Cir. 1998), in arguing that the ALJ should have summoned a medical expert to establish an onset
15 date of disability, and should have obtained certain chiropractor reports.² Later, in her reply brief,
16 plaintiff adds that the ALJ should have summoned a medical expert to address the significance of

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20 ² The reference in the record to the existence of chiropractic records is elusive at best. In
21 her disability application and in her field office interviews, plaintiff made no reference to having
22 received treatment by a chiropractor. (AR 73-101.) During the hearing, plaintiff made an off-
hand comment: "...and I even went to a chiropractor." (AR 222.) Furthermore, as the
Commissioner points out, a chiropractor would not be an "acceptable medical source" who could
provide evidence to establish an impairment. 20 C.F.R. § 404.1513(a).

certain x-ray findings, citing the ALJ's duty to "fully and fairly" develop the record.³ The Commissioner correctly responds that the ALJ's duty to develop the record "is triggered only when there is ambiguous evidence or when the record is inadequate to allow for proper evaluation of the evidence." *Mayes v. Massanari*, 276 F.3d 453, 459-460 (9th Cir. 2001). Furthermore, the Commissioner argues that the authority cited by plaintiff is not controlling, in that an ALJ is only required to call a medical expert to assist in determining the onset date of disability when the claimant has first been found to be disabled and the record is ambiguous regarding the date of disability. Because there is no evidence the record in this case was inadequate or that the evidence was ambiguous, plaintiff has not demonstrated error in the ALJ's failure to utilize the services of a medical expert or to otherwise further develop the record.

CONCLUSION

For the reasons described above, this matter should be AFFIRMED. A proposed order accompanies this Report and Recommendation.

DATED this 17th day of May, 2006.


 Mary Alice Theiler
 United States Magistrate Judge

³ It should be noted that, although addressed herein, the Court need not respond to arguments first raised in reply. *See, e.g., Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721, 725-26 (9th Cir. 1992) (declining to address arguments raised for the first time in a reply brief).